Supreme Court, U.S.
FILED
JUN 3 = 2003
OFFICE OF THE CLERK

(3)

No. 02-1364

IN THE

Supreme Court of the United States

MARK WIENER,

Petitioner,

v.

LAWRENCE-PICASO, INC.,
LAWRENCE PICASO, INC. d/b/a
LAWRENCE PROPERTIES and
LAWRENCE PROPERTIES,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT, STATE OF NEW YORK

REPLY BRIEF

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PRELIMINARY STATEMENT

The Opposing Brief as shown below amazingly and most flagrantly falsifies on crucial matters in this case (Reply Points I-IV, *infra*). This proceeding presents an unusual and excellent opportunity for the Court to vindicate the rights to due process, equal protection and jury trial which were so massively violated here by the New York appellate courts.

REPLY POINT I

IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION AND PETITIONER'S RIGHT TO JURY TRIAL, THE NEW YORK APPELLATE DIVISION UNLAWFULLY OVERTURNED THE JURY'S VERDICT ON LIABILITY WHICH HAD NEVER BEEN APPEALED.

The Opposing Brief outrageously misrepresents when it states "the Appellate Division never directed a verdict" against petitioner on liability and that "the Appellate Division respected the jury's finding of liability" (Opposing Brief, p. 18).

When the case was tried before the jury virtually the sole issue was alleged wilful nonperformance or malfeasance (Petition, p. 4, not disputed in Opposing Brief).

This was the liability issue, as correctly charged by the trial judge (PA361-PA362).[1] If there was wilful nonperformance or malfeasance, plaintiff would recover nothing (PA359 and PA361).

The jury verdict was that neither of these was present and, accordingly, respondents had breached the contract when they fired petitioner (Petition, p. 10a).

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1. "PA" refers to Petitioner's Appendix filed with the Appellate Division of the New York State Supreme Court.

The New York Appellate Division Opinion on its very face directs a verdict against petitioner on these issues (Petition, pp. 2a-3a). Nothing could be more plain. It overturned the jury verdict on liability, even though liability had never been appealed by the respondents.

Once respondents' liability was found by the jury, the computation of damages was a matter of simple multiplication, at the uncontested rate of $50,000 per year. The unchallenged testimony by the unrefuted expert witness before the jury was that the contract would have run for a minimum of ten years (PA220). The jury awarded 4.5 years of damages, comprised of one year from the initial 3 year term, and 3.5 years beyond the initial 3 year term, all of which was not challenged before the Appellate Division or in this Court. It was a very conservative calculation.

The only battle in this case has been on liability, to wit, whether there was wilful nonperformance or malfeasance.

Respondents' Second Question Presented (Opposing Brief, p. i) rolls out respondents' alleged evidence on the liability question of malfeasance or wilful nonperformance. All of that alleged evidence was heard by the jury during the eight day trial when it decided liability in this case, in favor of petitioner. The jury's finding that respondents were liable was confirmed by the trial judge who fully agreed and liability was never appealed by the respondents, which is undisputed (Petition, p. 5).

The Appellate Division broke the law and violated petitioner's constitutional rights when it chose to overturn the jury verdict on liability even though it had not been appealed and without notice to petitioner and in utter violation of established rules of the common law requiring that a jury verdict based solely on credibility of witnesses be fully respected. (Petition, pp. 6-7).

REPLY POINT II

SECTION 5501(c) OF THE NEW YORK CPLR AND THE DOCTRINE OF REMITTITUR, ARE BOTH COMPLETELY IRRELEVANT. ACCORDINGLY THEY DO NOT OVERCOME THE EGREGIOUS VIOLATION HERE OF PETITIONER'S CONSTITUTIONAL RIGHTS.

At pages 11-18 of the Opposing Brief, respondents rely heavily upon the doctrine of remittitur and New York CPLR 5501(c), as if they were relevant and could sanitize these violations of the constitutional right to jury trial, due process and equal protection.

Remittitur and New York CPLR 5501(c) are totally irrelevant in this case. This is not a case about alleged excessive damages, such as in a tort pain and suffering situation. The computation of damages here was extremely simple, very conservative and not contested (Reply Point I, *supra*).

The issue here is and was solely liability, whether there was malfeasance or wilful nonperformance. Witness the fact that the Opposing Brief goes on and on about alleged evidence on those questions alone and at no point disputes the calculation of damages by the jury (e.g., Opposing Brief, Second Question Presented, pp. i-ii and Opposing Brief, pp. 2-6).

Remittitur involves the ordering of a new trial unless the plaintiff agrees to a reduction of the verdict. This is conceded in the Opposing Brief at page 15:

> "ordering a new trial . . . conditioned on the verdict winner's refusal to agree to a reduction (remittitur) [citation omitted]."

Under New York law, where there is additur or remittitur:

> "The trial court does not merely substitute the figure it deems the minimum or maximum. It merely grants a motion for new trial, made by the aggrieved party on the ground of the inadequacy or excessiveness of the verdict, 'unless' the defendant agrees to pay a higher sum (additur) or the plaintiffs agree to accept a lower sum (remittitur) than the verdict." [D. Siegel, ***Practice Commentaries, C5501:8***, reprinted in ***7B McKinneys Consolidated Laws of New York Annotated***, pp. 22-23 (1995).]

CPLR 5501(c) is simply another form of additur or remittitur. Thus, in pertinent part it applies only to a case:

> "in which it is contended that the award is excessive or inadequate and that a new trial should have been granted unless a stipulation is entered to a different award. . . ."

That is the essence of remittitur, i.e. a new trial unless plaintiff consents to a lowered award.

All of that is irrelevant here. There was no new trial. The New York courts eviscerated the right to jury trial and violated due process and equal protection by overturning the jury verdict on liability and using that to reduce the damages in this breach of contract case by over 83% (from $205,000 to $34,266.67), a totally unprecedented and unlawful result (see Petition, subheading C, pp. 6-7).

REPLY POINT III

RESPONDENTS' FIRST QUESTION PRESENTED IS FALSE SINCE THE TERM OF THIS CONTRACT INCLUDES THE PERIOD OF AUTOMATIC RENEWAL.

The first Question Presented in the Opposing Brief totally misleads. This contract unquestionably provides for automatic renewal (Petition, pp. 3 and 25a).

Thus, the "unexpired term" of this contract is not merely the "initial term" (the latter being Respondents' own phrase, e.g. Opposing Brief, p. 19), but the entire "unexpired term" provided by the contract, namely the initial term and the period of automatic renewal, conservatively estimated by the jury at 3.5 years after the initial term expired (Reply Point I, *supra*).

Neither the Appellate Division nor the respondents' have questioned the enforceability of the automatic renewal clause in accord with its terms. Automatic renewal clauses are enforced by the courts as written [e.g. *L. Orlik Ltd.* v. *Helme Products Inc.*, 427 F. Supp. 771 (S.D.N.Y. 1977); *Schenkers Int'l Forwarders Inc.* v. *Meyer*, 164 A.D.2d 541, 564 N.Y.S.2d 323 (1st Dept. 1991) and ***22A N.Y. Jur.2d, Contracts § 455***, pages 143-144].

Thus, the "unexpired term" of the contract here is, at a minimum, the balance of the "initial term" plus the unchallenged 3.5 years of automatic renewal as conservatively estimated by the jury.

Given the absence of malfeasance or wilful nonperformance found by the jury, the only ground for respondents to terminate the contract would be the loss of the Ackerman Properties which did not occur (Petition, p. 3). The sole testimony was that the properties would remain with respondents for 10 to 20 years (PA220).

Petitioner was cheated out of a recovery for the "unexpired term" of the contract when the Appellate Division broke the law and overturned a jury verdict which had been based on credibility of witnesses.

REPLY POINT IV

REPLY TO OTHER ITEMS IN OPPOSING BRIEF.

1. Respondent falsifies when it outrageously claims there was ever any admission by petitioner of forgery or any other wrongdoing. The evidence on this matter was fully set forth in the Petition (Opposing Brief, p. 2 and Petition, pp. 7-9). This liability issue, as well as the related liability claims by respondents (insufficient building visits, etc.) were hotly contested at the trial, with "conflicting evidence . . . , with the issue being the credibility of each side's witnesses" (Trial Judge as quoted in Petition, p. 5). Obviously, there was no admission on this or anything else.

2. The Opposing Brief falsely states that the Trial Judge found wilful nonperformance or malfeasance (Opposing Brief, p. 16). The truth is the opposite. The Trial Judge upheld the jury verdict finding the total absence of both (Petition, p. 5).

3. Under paragraph 6 of the Employment Contract it was specifically required that petitioner receive three months' written notice of any alleged defects in his performance. In violation of such requirement this notice was never given (PA153, RA637,[2] RA 688-689 and PA428 included in Petition at p. 25a). The lack of the required notice to petitioner while he was employed was raised at the trial and before the New York State appellate courts (e.g., RA637, PA122, PA153 and PA333; Petitioner's Brief to the Appellate Division, pp. 10-11 and Motion to the New York Court of Appeals, p. 16).

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2. "RA" refers to Respondents' Appendix filed with the Appellate Division of the New York State Supreme Court.

4. The severe constitutional violations raised by this Petition were properly presented to the New York State Appellate Division and the New York State Court of Appeals (Petition, pp. 12-15).

REPLY POINT V

PETITIONER'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE UNLAWFUL ABROGATION OF THE JURY VERDICT RENDERED IN HIS BEHALF.

The Opposing Brief argues in flagrant error that petitioner's cause of action, and the jury verdict rendered thereon, are not entitled to due process (Opposing Brief, p. 19).

Petitioner's right to due process in connection with that jury verdict is part and parcel of the due process protections for petitioner's cause of action.

There can be no due process for a cause of action if the verdict rendered thereon can be illegally abrogated, as occurred in this case.

CONCLUSION

The Supreme Court must grant certiorari. This case presents an extremely important opportunity for this Court to vindicate the right to jury trial in this country so that rendered jury verdicts are not abusively and unlawfully set aside by state appellate courts, in violation of due process, equal protection of the laws and the last cause of the Seventh Amendment.

Every United States citizen's right to trial by jury is in severe jeopardy if the travesty of justice exhibited in this case is not remedied by the United States Supreme Court.

Respectfully submitted,

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